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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL ROBINSON, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

JOSEPH W. ANTONACCI, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

ALLEN OLSEN, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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32 pp

QUESTIONS PRESENTED

May a state require public employees to finance a labor organization's activities of a political, lobbying and ideological nature that are related incidentally in their subject matter to employee interests but are not part of the collective bargaining process?

May a state delegate to a labor organization the power to decide unilaterally the amounts and purposes of involuntary deductions from nonmember employees' salaries?

In the absence of a government-controlled method to protect the associational rights of a public employee at risk in a compulsory fee system, may a district court enjoin involuntary deductions from the employee's salary which are likely to advance union political and ideological causes which the employee opposes?

LIST OF PARTIES TO THE PROCEEDINGS AS REQUIRED BY SUP. CT. R. 21.1 (b)

PLAINTIFFS

Paul H. Robinson
Allan Roth
Elihu Abrahams
Alex W. Wypyszinski
Jackson Toby
Clifford Owens
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Joseph W. Antonacci
John Russell
Leon Matelski
William F. Gray
Meveril Jones

Richard H. Trexler
Edward Jakubco
Thomas Gay
A. William Onder
Mrs. Dorothy Gray

Allen Olsen
Larry Lang
William Anderson

Fred S. Smartt
Peter Yull
William J. Harrington

DEFENDANTS

Thomas H. Kean, Governor
Edward J. Bloustein
Rutgers State University
Rutgers University, Board of Governors
Rutgers Council, AAUP
Richard Laity
Richard Peskin

James W. Mastriani, Chairman Public Employment Relations Commission
Mr. James A. Gormley
Christine Mowry
Ms. Sandra Walther
Irvin J. Spitzberg, Jr.

Westfield Education Association
Sally Vejnoska
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Dr. L. J. Greene
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Pascack Valley Regional Education Association
David T. Dierker
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Middlesex County Education Association
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Frank Sidoti
Ridgewood Board of Education
Rosemarie Schutt
Township of Ocean Board of Education
James F. Jeffries
New Jersey Education Association
Edith Rulton
National Education Association
Willard H. McGuire

Communication Workers of America,
Glenn E. Watts,
CWA District One, CWA Locals: 1031, 1032, 1033, 1034, 1037, 1038, 1040,
Thomas H. Kean, Governor

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Paul Robinson, et al., Joseph Antonacci, et al., and Allen Olsen, et al. (plaintiffs or petitioners) pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

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[1] The required materials are bound separately. Appendix (App.) "A" contains

OPINIONS BELOW

The District Court's opinions (Apps. A1-A6) are reported at *Robinson v. New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982) (Robinson I); *Olsen v. CWA*, 559 F. Supp. 754 (D.N.J. 1983); *Robinson v. New Jersey*, 565 F. Supp. 942 (D.N.J. 1983) (Robinson II). Its opinion, and order, denying defendants' motion for stay is unreported. App. C-5. The opinion of the Court of Appeals (App. A-7) is reported at 741 F.2d 598 (3d Cir. 1984).

JURISDICTION

The Court of Appeals issued its opinion on August 6, 1984. On September 11, 1984, it denied a timely petition for rehearing *en banc*. App. C-1. On September 20, 1984, it granted a stay of judgment, and on October 5, 1984, it lifted the stay. Apps. C2-C4. This petition for certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves vital First Amendment protections of the rights of speech, association and petition, and the Fourteenth Amendment protections of substantive and procedural due process, and equal protection. It seeks remedies under 42 U.S.C. § 1983. This case involved the 1980 amendments, N.J. Stat. Ann. §§ 34:13A-5.5 to -5.6,

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the appellate and district court decisions. App. B contains the constitutional and statutory provisions. App. C contains miscellaneous material.

to the 1968 New Jersey [Public] Employer-Employee Relations Act, N.J. Stat. Ann. §§ 34:13A-1 to -5.9, and implementing rules N.J. Admin. Code tit. 1, § 20-1.1 to -1.9. The verbatim text of these constitutional and statutory provisions with the legislative history of the 1980 amendments are presented in Apps. B1-B5.

The pertinent provisions of the Employer-Employee Relations Act are:

> § 5.3 [P]ublic employees shall have . . . the right . . . to form, join and assist any employee organization or to refrain from any such activity.
>
> * * *
>
> Representatives designated or selected by public employees for the purpose of collective negotiation by the majority of the employees in a unit . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.
>
> * * *
>
> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit . . . .

App. B-2.

The pertinent 1980 amendments are:

> § 5.5 [T]he majority representative and the public employer of public employees in an appropriate unit shall . . . negotiate concerning . . . requiring the

payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues. . . .

The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members . . . but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with [§ 5.6] a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. . . . The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for employees represented advantages . . . in addition to those secured through collective negotiations with the public employer.

§ 5.6 [A] majority representative . . . shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees . . . who are not members of a majority representative: provided, however . . . that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which pro-

> vides pro rata returns as described in [§ 5.5(c)]. The demand and return system shall include a provision by which persons who pay a representation fee . . . may obtain review of the amount returned . . . [with] appeal to a board consisting of three members. . . . Of such members, one shall be representative of public employers, one shall be representative of public employers, one shall be representative of public employee organizations and one . . . shall represent the interest of the public.

App. B-3.

STATEMENT OF THE CASE

1. Factual Background.

New Jersey grants public employees a statutory[2] right to organize and present grievances and proposals to their public employer through representatives of their own choosing. *Lullo v. International Association of Fire Fighters, Local 1066*, 55 N.J. 409, 415 (1970). The state requires the majority's representative to act on behalf of all employees in the bargaining unit as the exclusive representative for the purpose of negotiating and consummating a contract respecting the terms and conditions of employment. *Id.* at 427, 429-30. The state does not give an employee, or representative, a right to negotiate on subject matters controlled by statute or government policy. *In re IFPTE, Local 195*, 88 N.J. 393, 401-05

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[2] There is no constitutional right to bargain either collectively or individually with a public employer. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-66 (1979).

(1982). It, of course, recognizes that employees "like all other citizens, possess the [fundamental] right to petition the government for the 'redress of grievances' . . . [and] to seek to influence governmental decision-making . . . through the customary political channels." *Township of West Windsor v. PERC*, 78 N.J. 98, 111-15 (1978).

Prior to the 1980 amendments the state gave employees a right to refrain from contributing "to union expenses" incurred for the purpose of "collective negotiations and the handling of grievances." *New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Authority*, 123 N.J. Super. 461, 470 (1973), *aff'd*, 64 N.J. 579, 581 (1974). In 1980 the state changed that to provide automatic deductions from nonmembers' salaries to support union "activities or causes of a partisan political or ideological nature." App. at 204a-209a. Upon union urging the state provided procedural protections for nonmembers in the form of "a [union] 'demand and return' refund system based on a rebate after objection of any portion of fees used by the union for partisan political or ideological purposes only incidentally related to the terms and conditions of employment." App. at 205a. After exhaustion of the union's system, App. at 209a, 213a, ¶ 4.1(a), the state provided for review by a "tripartite appeal board." App. at 205a, 209a.

The law authorizes a multi-tiered organization to act as a majority representative. App. at 189a, § 13A-3(e). Membership dues and statutory deductions support the activities of all tiers. The law authorizes the union to take[3] involuntary deductions from nonmembers in

[3] The employer may not challenge the amount or purpose of a demand to deduct. *Township of Hamilton and CWA, Local 1042*, No. CO-82-124-111, PERC No. 82-121 (N.J. 1982).

amounts limited to 85% of voluntary dues.

Petitioners are public school teachers, state university professors and civil service employees. They chose not to join the organization representing their bargaining unit. Their employers took 85% of dues from their salaries and gave the funds to the respondents. Petitioners expressed strong opposition to financing the respondents' political and ideological viewpoints. They demanded that deductions be limited in amount only to support of the union in its capacity as an exclusive representative. They were compelled to use the statutory rebate procedures. After fruitless efforts, petitioners filed these cases.

2. Proceedings Below.

In proceedings below petitioners contended that in purpose, necessary effect, and practice, the statute forces contributions to union lobbying and ideological causes, and so abridges federal rights to petition government, speak and associate. They claimed that the statute favors the union memberships' viewpoints on public issues at nonmembers' expense, and that it makes restraints on nonmembers' associational rights dependent upon whether the subject-matter of the unions' communicative activities is related to employment conditions. Petitioners claimed that the statutory system of union-controlled rebate with review in a partisan board failed to protect their interests and burdened associational rights. Under 42 U.S.C. § 1983 plaintiffs sought preliminary, permanent injunctive and declaratory relief.

On September 28, 1982, Judge Debevoise filed a lengthy

decision in *Robinson I*. App. A-1. He held that the statute authorized labor organizations to collect and use nonconsensual fees for activities of a political and ideological nature including lobbying. App. at 49a, 62a. He enjoined the use of petitioners' fees for lobbying government. Based on documentary evidence he found the exclusive, rebate procedure did not prevent compulsory subsidization of ideological activity. App. at 49a-53a, 61a-62a. He ordered the government and unions to file statements of proposals "to bring the representation fee system into compliance with constitutional requirements, including proposed statutory changes." App. at 69a-70a, ¶5.

The unions and petitioners appealed. But, before the above order in *Robinson I* issued, six state civil service employees in *Olsen* filed a class action complaint and moved for injunctive relief. The court reaffirmed its conclusion that the state could not require employees to pay for the union memberships' lobbying on public policy issues. It found the statute subsidized union efforts to change some 500 pieces of legislation. The court examined the voluminous accounting and rebate system material which CWA had designed for the case of *Beck v. CWA*, App. at 78a-89a, but deferred ruling on the due process issues. CWA and petitioners appealed.

On May 3, 1983, the District Court held a consolidated hearing to decide whether to grant additional relief. Incorporating its prior findings, the court held: that the statute required deductions computed in part on the union's political, ideological and lobbying expenses; that no provision existed for determining the propriety

of an assessed fee but rather the system granted a right "to recover back that portion of the fee [taken] and used for political and ideological purposes"; that this system imposed a heavy burden on the nonmember to protect his rights; and, that "the public has no interest whatsoever in facilitating payment of that portion of the [forced] fee authorized by the New Jersey legislature which reflects the union's political, ideological and lobbying expenses." App. at 130a. Consequently, the District Court enjoined the public employers from "deducting and paying" representation fees on account of any plaintiff. App. at 136a, ¶ 3. The unions appealed.

A sharply divided Court of Appeals reversed. It decided that the subject matter of union activity determined whether government may compel another to finance it. App. at 155a. It gave collective bargaining an expanded definition, deeming it a subject-matter-oriented activity conducted "in a number of arenas." *Id.* Because statutory subject matter and public policy issues of interest to the union membership are outside the scope of negotiation in the collective bargaining process, the court reasoned that the state may compel nonmembers to support union activity outside collective bargaining as long as it is designed to advance member-employee interests embraced in those subjects. It held that this Court had granted full First Amendment protections to associational rights in the area only of a union's "*purely* political purposes." App. at 158a.

The majority of the court found the resolution of the due process question depended upon the adequacy of each organization's demand and return arrangements.

App. at 166a-69a. It held the injunction improper because: the legislature limited deductions to 85% of dues; the unions unilaterally escrowed some percentage of the deducted amounts; and petitioners had not proven the actual union expenditures.

The dissent believed that the question was whether the law provided adequate protection rather than whether union mechanisms adopted "ad hoc" in response to court orders were satisfactory. The dissent concluded that a statutory "exaction/demand/return" system was inadequate to satisfy due process.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Answered Important Questions of Law in a Manner Conflicting With Applicable Decisions of this Court and Severely Restricting the Individual Employee's Right to Determine His Own Political and Ideological Will.

This case presents important[4] questions of the law with far-reaching implications to the individual's power to exercise the freedom of petition and association to bring about, refrain from, or oppose political and social change. This Court has carefully delineated the boundary of the regulated collective bargaining process wherein by law an individual's rights must yield to the majority.[5] In this framework the Court sanctioned an impinge-

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[4] The Court of Appeals recognized this case presents "important questions." The District Court also recognized this matter "has to be determined in the United States Supreme Court." App. at 233a.

[5] *Compare, Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (labor peace achieved by policy of

ment upon the individual's rights for the commercial[5] purpose of reimbursing a union "as a collective bargaining agent," in performing the duties of an exclusive representative in dealing with the employer. *Ellis v. BRAC*, 104 S. Ct. 1883, 1891-92, 1896 (1984). Outside that framework this Court has never, under the guise of "exclusivity," allowed government to erode those rights of citizens upon which a democratic society depends and so highly values. *See, e.g., City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 174-76 (1976). The lower court departs radically from the decisions and principles enunciated by this Court.

The Court of Appeals interpreted the decision in *Abood*[6] to proscribe only state-compelled financing of union political or ideological purposes which are unrelated to collective bargaining, i.e. *purely* political. App.

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encouraging the procedure of collective bargaining where the majority of employees in appropriate unit choose a representative with vested power to order the individual's relations with the employer, *id.*, 62-4), with *Lullo*, 55 N.J. at 426-30 (individual's statutory right to negotiate terms yields to state's interest in stable relations through use of exclusive representative to negotiate and consummate contract for all employees in unit).

[5] See, *Roberts v. United States Jaycees*, 104 S. Ct. 3244, 3260 (1984) (O'Connor, J., concurring); *Metromedia v. City of San Diego*, 453 U.S. 490, 504-07, 515-20 (1981).

[6] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). After the state court found the legislature authorized use of compulsory contributions for such political activities as "lobbying for the passage of bills," 60 Mich. App. 93, 99, this Court held that government was prohibited from compelling support for such activities. 431 U.S. at 215, 232, 235-36. Previously, the Court avoided such "question of utmost gravity" by construing the Railway Labor Act to deny the union power to collect compulsory fees to lobby. *IAM v. Street*, 367 U.S. 740, 745 n.2, 768, 769 n. 17, 771 (1961).

at 158a. It expanded the regulatory framework of collective bargaining to include "a process whereby unions *must* advance the collective interests of their members in a number of arenas." (Emphasis added.) App. at 155a. It recognized that many public policy issues of employee interest are determined through the political processes, rather than as negotiable items in the collective bargaining process. The Court of Appeals reasoned, therefore, that government may force all public employees to support a union's political activity, so long as it is related to employee interests.

The court held that "lobbying has no different constitutional implication from any other form of union activity." App. at 160a. Thus, it equates a requirement to subsidize political or ideological activity having a subject matter relationship to the kinds of matters which may arise in a contract negotiation with the requirement to reimburse an exclusive representative for discharging its delegated tasks in the collective bargaining process itself.

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[6] The court's reliance upon *Eastex* and *Knight* is seriously misplaced. Its conclusion conflicts with the plain definition of collective bargaining in 29 U.S.C. § 158(d). In *Eastex v. NLRB*, 437 U.S. 556 (1978) the Court acknowledged the distinction between collective bargaining and concerted activities, and noted prohibitions for some activities, such as in the area of compulsory dues, which are nonetheless protected. *Id.* at 566 n.16. Protections to a statutory right cannot justify government abridgements of fundamental rights. In *Ellis*, BRAC Brief, at 30-1, 36-9, NEA's Amicus Brief at 15 (citing *Eastex*), this Court encountered the argument that government may force employees to support union activity on "fronts other than collective bargaining" to advance "labor's cause" because these activities related to the majority's interest. The Court "squarely rejected" it. 104 S. Ct. at 1891, 1894-95. Nor can the decision in *Minnesota State Board For Community Colleges v. Knight* justify the result below. This Court noted the entire case involved no claim that anyone was compelled or restrained by government. 104 S. Ct. 1058, 1069-70 nn. 11-13; 1073, 1083 (1984) (dissent).

It essentially confuses the values assigned to the protection of core First Amendment activity with the values this Court assigned to the protection of mere commercial activity in a bargaining unit. If allowed to stand, the decision would be in substantial conflict with basic principles of self-government and would be a significant injury to the right of every citizen to advocate his own ideas and to associate "for the bringing about of political and social change."

The statute "specifically authorizes mandatory withholding of money from workers' salaries which may be used in the first instance for political lobbying purposes, with the proviso that there be a mechanism whereby those who object to this can get it back." App. at 231a. From the first automatic deduction the nonmember has the heavy burden to ascertain and halt the advancement of ideas vitalized and promoted by his salary. Because First Amendment freedoms are held captive to a costly process involving a comparatively small economic stake, the statute shifts power from the individual's political and ideological will to a special interest group whose influence is "geometrically enhanced at the expense of both the individual rights of the employees and the ability of the lone political actor to be effectively heard." *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894, 900 (3d Cir. 1983). The legislature, thus, writes the union a blank check upon the First Amendment rights of all the persons who are subject to the statute.[9]

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[9] Approximately 423,639 government employees are subject to this statute. Bureau of Census Report No. GE-81, *Public Employment in 1981*, Vol. 1, Table 7, p. 13 (Aug. 1982). Average deductions are $220 per annum. CWA, for example, takes about 3 million dollars annually from nonmembers. Increased dues increase deductions. In their 1982-83 budget NJEA decided an increase to allocate 1.985 million dollars to

This Court has consistently held that government may not discriminate between First Amendment actors on the basis of their employment or the content of their speech. *City of Madison*, 429 U.S. at 176-77. The strength of protection for associational rights cannot, as the Court of Appeals would have it, be made to depend on the subject matter of a union's communicative activity. *FCC v. League of Women Voters*, 104 S. Ct. 3106, 3119-20 (1984). The individual's right to associate freely in support of his causes, or refrain from advocating any viewpoint, is no less protected because an activity involves subject matter which "fosters [union] policy goals in collective negotiations" or secures advantages in conditions of employment unavailable in the collective bargaining process. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 103-04 (1940). The legislature's attempt to restrict the rights of nonunion employees, while enhancing the relative voice of union members, is foreign to the First Amendment. This Court has condemned granting such advantages to one side to express its views on public issues to the people or their representatives. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978); *id.*, at 815-18 (White, J., dissenting). A contrary conclusion would allow government, in the interest of a temporary majority, to abridge speech concerning almost every matter of importance to society.

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their litigation efforts and additional amounts to 7 full-time lobbyists. There is a direct relationship to candidate support. For example, NJEA contributes to its PACs based upon whether a legislator agrees with lobbying initiatives to pass "right to strike" legislation or to oppose any effort to make New Jersey a "right to work state," or block Civil Service measures. *See, e.g., Newark Star-Ledger*, Dec. 4, 1983, sec. 1, p. 26, col. 1; *Asbury Park Press*, Nov. 6, 1983, sec. A-1, cont'd, A-30. The decision below allows lobbying with nonconsensual deductions for over 500 pieces of legislation.

This Court should grant the petition to redress the significant damage the decision of the lower court does to First Amendment jurisprudence, and to liberty itself.

2. The Majority of the Court of Appeals' Decision That an Exclusive, Union-Controlled Statutory Rebate System May Satisfy Due Process of Law Conflicts with Principles Enunciated by this Court, and With the Decisions of the Seventh Circuit and the Supreme Judicial Court of Massachusetts.

On the important due process issues involved, the majority decision below conflicts with applicable decisions of this Court, the Seventh Circuit, and the Supreme Judicial Court of Massachusetts.

First, the lower court narrowly confined the public employee's interest at risk in the system of deductions to an involuntary loan.[10] It then held that this Court's decision in *Mathews v. Eldridge* controls here. App. at 165a. *Eldridge* involved the discontinuation of disability benefits after the agency's factual investigation but before a full evidentiary hearing. Petitioners' property and liberty interests are not akin to Mr. Eldridge's right to disability benefits.

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[10] The court rested this conclusion upon *Ellis, supra*. Its reliance is misplaced. That case concerned remedies for breach of a statutory duty after a trial for damages. It involved private sector employers and a statute authorizing consensual deductions. The statute had been construed facially and as applied to empower only constitutionally permissible collections. Congress caused no cognizable injury to protected rights. In *Abood* this Court rejected the "premise that public employers are under no greater constitutional constraints than their counterparts in the private sector." 431 U.S. at 227 n.23. A public employee has due process rights when a deprivation occurs. *Knight*, 104 S. Ct. at 1067 n.9.

This Court has expressed an unequivocal appreciation of the risks to the individual's liberty interests that occur at the time of collection. *Knight*, 104 S. Ct. at 1070 n.13. A forced deduction from an employee's wages is "tantamount to coerced belief," *Elrod v. Burns*, 427 U.S. 347, 355 (1976), which simultaneously diminishes the individual's ability to act according to his beliefs or associate in support of his own viewpoint. *Branti v. Finkel*, 445 U.S. 507, 513 n.8, 517 (1980). The Supreme Judicial Court of Massachusetts properly protected these interests when it held that the union's statutory right to receive a fee was outweighed by the nonmember's right to refrain from advocating another's viewpoints and to espouse his own. *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 83-84 (1982). Recently, the Seventh Circuit protected these transcendent values in deciding that government has a duty to "establish a procedure that will make reasonably sure that" the deductions are not made for reasons outside the government's legitimate interest. *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1194 (7th Cir. 1984).

These two courts found threats to liberty in forced contributions to a union sufficient to require timely, government-controlled procedures. Like the District Court and dissenting judge below, the Seventh Circuit and state supreme court concluded that union-controlled procedures, including a unilaterally determined escrow, do not provide due process of law. *Hudson* at 1194-97; *Greenfield* at 78-79, 82. These courts instead required the government to establish a neutral, advance determination of the amount of the agency fee.

The dissent below correctly considers the primary issue to be what process did the state (not union policy) provide. In this case the state provided only a union rebate scheme with a partisan "review board." That system is identical to the one that in *Ellis* this Court held inadequate as a statutory remedy. 104 S. Ct. at 1890. In the area of due process this Court held a statutory system delegating to an adverse, interested private party the control over a government decision to deprive one of property interests was constitutionally inadequate. *Fuentes v. Shevin*, 407 U.S. 67, 80-82 (1972). Because the state here is in a position to provide predeprivation process, this Court's decisions dictate that it do so. *Hudson v. Palmer*, 104 S. Ct. 3194, 3204 (1984). The state cannot delegate that duty to a private organization.

3. The Course Pursued by the Court of Appeals in Analyzing the Substantial First Amendment and Procedural Due Process Issues Was Followed in a Manner Which Calls for the Exercise of this Court's Supervisory Powers.

The Court of Appeals considered the individual's rights of speech, petition, association and due process without subjecting its work to the analytical scrutiny this Court requires. *Bellotti*, 786-87. In its analysis the Court of Appeals irrelevantly focuses upon the union's right to engage in political and ideological activity. Its decision rests, in part, on some limit imposed on that right. Nothing in this case, however, represents government action that restricts or abridges the union's right. The relevant principle, which the Court of Appeals forgets, is that a union has no right to a government

subsidy for its political activity. It is petitioners who suffer from unconstitutional state action, not respondents. The state has no justification to deprive some in order to enhance others' political causes. The Court of Appeals mechanically construes the government justification this Court found in a "bare authorization" of an agency shop in the public sector, *Abood*, 431 U.S. at 225, and expands its scope.[11] App. at 160a. The lower court improperly neglects the constitutional inquiry by seeking an extension of the government justification for the restraint imposed. *Roberts*, 104 S. Ct. at 3260. It fails to assess the value to society of the individual rights restricted by the statute before it. This is not simply a statute that imposes a requirement to pay for the costs for an exclusive representative. The deferential treatment which the court below gives the state's regulation of rights of petition and association represents a significant departure from the accepted course of judicial investigation. Such treatment cries out for the exercise of this Court's supervisory powers.

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[11] The Court has condemned such practice. *See, e.g., In re Primus*, 436 U.S. 412, 434 n.27 (1978). The state here chose not to come forward to meet its burden in opposition to the injunction. The only justification for the statute in the record is that subsumed in the concept of eliminating the "free rider" to protect "exclusivity." *Abood* at 220-22, 224; *Knight*, 104 S. Ct. at 1083 (Stevens, J., dissenting). Confusing organizational interests with public interests, the lower court makes no effort to separate the bargaining transactions in which government has regulatory interest, *see, e.g., Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 562 n.5 (1980), from the activities "indissolubly relat[ed] to the immediate economic and social concerns that are the *raison d'etre* of unions." *Street*, 367 U.S. at 800-01, 812-16 (Frankfurter, J., dissenting).

4. The Court of Appeals' Decision That this Court's Holding in *IAM v. Street* Controls the Equitable Power of a Federal Court Under 42 U.S.C. § 1983 Presents a Significant Question Concerning the Ability of a Trial Court to Protect Fundamental Rights of Public Employees.

The majority of the Court of Appeals concluded that injunctive relief was improper notwithstanding a serious question on "the constitutional adequacy of the demand and return systems." App. at 173a. It operated under an assumption that the District Court's order against government collection and union use of plaintiffs' fees was equivalent to the decree of the Georgia Supreme Court in *IAM v. Street*, *supra*, at 772-73. This is erroneous. But, it is not this obvious error that requires this Court's attention. The underlying issue is more substantial: namely, whether under 42 U.S.C. § 1983 a court may restrain the operation of a government system which contains both substantial risks to constitutional rights of belief and association *and* no predeprivation process. The Court of Appeals' holding precluding such equitable restraints conflicts with a long line of prior decisions of this Court. *See, e.g., Babbitt v. UFW*, 442 U.S. 289, 298 (1979).

In *Perry v. Local Lodge 2569, IAM*, the Seventh Circuit ordered injunctive relief on grounds that the nonmember should not be required to pay a fee until there exists a constitutional system requiring the union to prove the validity of the assessment. 708 F.2d 1258, 1262 (7th Cir. 1983). The system here requires no

advance showing or government determination of a legitimate amount to be deducted from salary. The court below decided that the statutory 85% limit and the union's decision to escrow some percentage of fees protect against irreparable harm. The limitation of 85% of dues and the union's ad hoc concession to escrow are not, however, facts affecting the determination of government to deduct a legitimate amount. The court below does regard these as facts. The presumptive validity of the results of a procedure cannot substitute for the decisionmaking process itself. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

The Court of Appeals decided that proof of union spending is a necessary predicate to finding irreparable harm. If the court is correct, a district court would be unable to protect against irreparable harm without a full trial at which plaintiffs would have the burden to prove how the union spent their money. This Court has upheld injunctive relief where harm to First Amendment freedoms was likely to occur. *Elrod*, 427 U.S. at 373-74. Where government operations create such an unnecessary risk to freedoms of speech, belief, petition and association, the Court has found them properly enjoined. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852-53 (1984).

Moreover, whether the decision of this Court in *Street* does remove the equitable power of a trial court to protect the fundamental rights of public employees also presents a significant question. This Court should answer it here.

In these cases the District Court determined the facts and applied the law this Court pronounced. It achieved a result that protects interests vital to all citizens whether or not they choose to join a labor organization. The Court of Appeals' decision accomplishes the opposite. An individual's right to liberty, property and due process must not be submitted to the will of a membership organization that masquerades as a proponent of the public weal.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the errors of the Court of Appeals are manifest in light of the pertinent opinions of this Court, and the statutory language and its history, this is an appropriate case for summary reversal.

Respectfully submitted,

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